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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES M. STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

OPPOSING BRIEF OF RESPONDENT.

FRANCIS H. URIELL,
JOHN R. WHITMAN,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Admiral Corporation, Respondent.

POPE & BALLARD,
120 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

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OPINION OF COURT OF APPEALS.

The opinion of the Court of Appeals for the Seventh Circuit was issued on January 5, 1949 (R. 438). Judgment of reversal and remandment for a new trial was entered on the same date (R. 444). Petition for rehearing was denied on February 3, 1949 (R. 445).

The opinion is reported at 171 F. (2d) 777. It is also quoted in full in the Record, filed by plaintiffs-petitioners,* at pages 438 to 443, inclusive.

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* Plaintiffs-petitioners are hereinafter referred to as "plaintiffs," and respondent as "defendant."

SUMMARY OF MATTER INVOLVED.

The Court of Appeals reversed a judgment for plaintiffs, entered in the trial court on jury verdicts, upon the ground that in denying defendant's motion to strike certain prejudicial evidence introduced by plaintiffs, the trial court committed reversible error. The evidence in question embraced some sixteen pages of plaintiffs' testimony concerning mistreatment alleged to have been suffered by them at the hands of police officers of the City of Chicago (R. 46-56, 102-108). Defendant's motion to strike was made and overruled at the close of plaintiffs' case (R. 180-181).

The plaintiffs contend here, as they did in the Court of Appeals: First, that the motion in question was properly denied solely because of alleged technical defects as to the time and form of the motion; and second, that, assuming the trial court was not thus saved from error, the error was later cured, principally through an instruction relating to damages which the trial court gave on submitting the case to the jury.

The Court of Appeals overruled these two contentions. From this spring plaintiffs' claims that a writ of certiorari should be granted.

STATEMENT OF THE CASE.

It is not necessary to restate the facts fully in order to enable this Court to pass upon plaintiffs' petition. A brief statement, however, of facts giving the setting in which the prejudicial evidence appears may be of assistance to the Court.

An outline of these facts is as follows:

On May 1, 1946, the defendant, Admiral Corporation, a radio manufacturer, suffered a burglary at its warehouse in Chicago, Illinois (R. 236-237). A large quantity of radio loud speakers, phonograph needles and wire was stolen (R. 240, 246).

Police officers from the Chicago Detective Bureau promptly commenced an investigation to locate the stolen property (R. 199, 201). Their investigation eventually led them to plaintiffs' place of business (R. 200, 201). It was a wholesale business called "Chicago Radio Parts Supply" and was located in a basement store in Chicago (R. 45).

On Saturday, September 21, 1946, the police called at plaintiffs' place of business and on the same day arrested plaintiffs, without a warrant, and lodged them in jail (R. 41-42, 202-211, 251-252). Plaintiffs were held in jail from Saturday until the following Monday, September 23, under conditions which plaintiffs vividly described in their testimony and which will be referred to below in this brief.

On Monday, September 23, the police phoned Bernard Heinrich, an employee of the defendant, and asked him to come to the Detective Bureau. At the Detective Bureau, Heinrich identified the property found by the police in plaintiffs' hands as a part of the stolen property (R.

251, 252). Thereupon, at the request of the police, he signed complaints charging plaintiffs with receiving stolen property, and plaintiffs were released on bond (R. 213-215).

Up to the time the police called Heinrich on Monday, defendant had no knowledge that an arrest had been made or was even contemplated. Thus, defendant did not know about or participate in anything which took place prior to the time when defendant's employee came in and signed the complaints on that day.

Among the things which took place prior to the signing of the complaints were the arrest and imprisonment of plaintiffs, without a warrant. Among them, too, were the alleged acts of mistreatment to which plaintiffs testified they were subjected during their detention by the police from Saturday until Monday (R. 46-56, 102-108).

Plaintiffs' testimony concerning the alleged mistreatment suffered by them during their detention is thus summed up by the Court of Appeals in its opinion (R. 441) (171 F. (2d), at pp. 779-780):

> "The court received evidence of plaintiffs' alleged mistreatment by the police during the two days when they were in custody, before defendant was advised of their detention and caused the complaints to issue. Plaintiffs testified that the police officers placed them in separate cells, where they had no facilities for sleeping or bathing and no toilet; that they were later removed to another room and questioned, and then to other cells. According to Robert, he was imprisoned some three or four hours with a number of other prisoners. The later confinement places were, they said, 'much filthier' than the ones in which they were first lodged. Finally Robert was moved to a large cell, in which were 'several drunken people' who 'looked like bums' and 'like they were infested with all types of vermin.' Their pictures were taken with the Svobodas, and they were put through 'show-ups' under flood lights. The coffee was not 'fit to drink'; they

were offered bread and bologna sausage 'of which even the smell nauseated' them. These and other revolting details of alleged mistreatment were received in evidence."

This testimony of plaintiffs—concerning their detention from Saturday until Monday when the complaints were signed—was the evidence which defendant sought, by motion, to have stricken at the close of plaintiffs' case. And it was the trial court's denial of this motion which was held by the Court of Appeals to be reversible error.

QUESTIONS PRESENTED.

Plaintiffs divide their petition into four separate points or sections (Pet'n for Cert., I through IV, pp. 10-24). These involve but two main questions:

First, whether, in refusing to sustain the trial court's erroneous denial of defendant's motion to strike upon the sole ground that the motion was improper as to time and form, the Court of Appeals has rendered a decision in conflict with other decisions of Courts of Appeals on the same matter,—thus warranting the allowance by this Court of a writ of certiorari.

Second, whether, in concluding that this error of the trial court was not later cured, the Court of Appeals has rendered a decision which is in conflict with decisions of this Court,—thus warranting the allowance of the writ.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals Correctly Decided That Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Proper in Time and Form, and That the Trial Court's Denial of It Constituted Reversible Error; and This Decision Is Not in Conflict With Any Other Decisions of Courts of Appeals on the Same Matter.

The evidence which the trial court refused to exclude is, on its face, highly inflammatory and prejudicial. Plaintiffs do not deny this. The Court of Appeals has accurately characterized it in its opinion as "most prejudicial to defendant."

Plaintiffs' contentions (Points II and IV, Pet'n for Cert., pp. 15-19, 21-22) concerning the alleged procedural impropriety of defendant's motion to strike are without merit. Defendant's motion was presented at the close of plaintiffs' case. This was the moment when it first became apparent that the prejudicial evidence in question could not be charged to the defendant. Hence, defendant's motion was timely made.

There is no merit to plaintiffs' claim that the motion was "too general." For it is apparent from the record in this case that both the trial court and plaintiffs were fully aware of the nature and extent of the testimony which defendant sought, by its motion, to strike from the record. The cases cited and relied upon by plaintiffs in support of the alleged procedural impropriety of defendant's motion are not in point. None of them presents a situation involving evidence remotely similar, in inflammatory character,

to the evidence involved in the case at bar. Nor do any of them present a question of trial technique which is parallel to the one here involved.

II.

The Court of Appeals Correctly Decided That the Trial Court's Error in Denying Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Not Later Cured; and This Decision Is Not in Conflict With Any Applicable Decisions of This Court.

Plaintiffs' contention (Point I, Pet'n for Cert., pp. 10-15) that the trial court's error was later cured by a form of instruction on damages is without merit. The instruction in question was tendered and given in the light of the trial court's ruling on the motion for directed verdicts, made at the close of all the evidence, as to the false arrest and imprisonment charges. It was directed to the alleged *illegal* acts of arrest and imprisonment without a warrant. It did not tell the jury to disregard the evidence as to all acts of the police which occurred during plaintiffs' detention up to the time when the complaints were signed, or to exclude any of such evidence in determining whether defendant was guilty of malicious prosecution.

The decisions relied upon by plaintiffs with respect to this contention are not in point. They should be confined to the particular situations there presented, which are unlike anything here involved.

Plaintiffs' contention (Point III, Pet'n for Cert., pp. 19-21) that the trial court's error was rendered "harmless," within the contemplation of Rule 61 of the Federal Rules of Civil Procedure for U. S. District Courts, is likewise without merit. That the "harmless error" principle is no sup-

port for plaintiffs' contention is established by decisions of this Court.

Plaintiffs' contention to the effect that the remarks of counsel cured the error is without substance. It is the Court's instructions, and not counsel's predictions as to what they may be, which determine the sufficiency of the Court's charge to the jury.

The Court of Appeals, contrary to plaintiffs' contention, stayed squarely within the limits of "the accepted and usual course of judicial proceedings"; and there is no warrant for the issuance of a writ of certiorari in this case.

ARGUMENT.

I.

The Court of Appeals Correctly Decided That Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Proper in Time and Form, and That the Trial Court's Denial of It Constituted Reversible Error; and This Decision Is Not in Conflict With Any Other Decisions of Courts of Appeals on the Same Matter.

The evidence which the trial court refused to exclude is, on its face, highly prejudicial to the defendant. It is characterized by the Court of Appeals in its opinion as "most prejudicial to defendant" (R. 442).

Plaintiffs do not deny this, but rely instead on the alleged procedural impropriety of defendant's motion as grounds for claiming the motion was properly denied.

Under Point II and again under Point IV of their petition (Pet'n for Cert., pp. 15-19, 21-22), plaintiffs repeat the same contentions in this regard as they presented to the Court of Appeals. They include the claim that the motion should have been made sooner; that it should have been made later; that it should not have been made at all, the defendant being obliged to rely upon its right to tender instructions to the jury at the close of the case. Plaintiffs also claim that the motion was "too general" (Pet'n for Cert., pp. 16, 18). But in holding that the denial of the motion to strike was reversible error, the Court of Appeals rejected all of these contentions.

As pointed out by the Court of Appeals in its opinion (R. 441-442) (171 F. (2d), at p. 780):

"Defendant had in no way participated in or in

> any manner been responsible for the actions of the police. Prior to Monday morning, September 23, when defendant's attention was first called to the matter, it had no knowledge that an arrest had been made or was even contemplated. It did nothing to initiate or inspire what happened in the two preceding days. The police officers derived their authority solely from the State, of which, when they performed their functions, they were agents; they were not acting as agents or employees of defendant. As said in *Chesapeake & Potomac Telephone Co.* v. *Lewis*, 69 App. D. C. 191, 99 F. 2d 424, at page 425: 'Mere information to the officers of the law by a citizen, tending to show that an offense has been committed and that some person named may be suspected of its commission, is not sufficient, of itself, to warrant the inference that the informer or his agents participated in the unlawful arrest and imprisonment of the accused by the officer.'
>
> "It cannot be questioned, we think, that this evidence was most prejudicial to defendant. The court denied a motion to strike it. We think the motion should have been allowed."

Contrary to plaintiffs' claim, the action of the defendant in making the motion in question falls squarely within the limits of correct trial technique. As defendant pointed out to the Court of Appeals, the applicable general rule is thus stated in 64 C. J. at p. 203:

> "A motion to strike out *is necessary* when evidence apparently proper when admitted is subsequently shown to be objectionable * * * " (Italics supplied).

The timeliness of defendant's motion is supported by Federal as well as State authorities. In *Wendell* v. *Willetts*, 183 Fed. 1014 (C. Ct., N. Y.), it was held that where evidence which is apparently admissible when presented is later found to be immaterial, a motion to strike is proper. And it is supported by *Frankfurter* v. *Bryan*, 12 Ill. App. 549, 554. There the court had before it a

situation very similar to the one at bar. It was an action for false imprisonment and malicious prosecution brought by plaintiff Bryan against defendants Frankfurter, Blocks and a justice of the peace named Harrar. At the close of plaintiff's case, Harrar was dismissed. There was no evidence that either Blocks or Frankfurter had in any manner directed or participated in Harrar's action in causing plaintiff to be jailed and to suffer various other acts of mistreatment.

Defendants Frankfurter and Blocks thereupon moved to exclude from the jury all of the evidence relating to the wrongs suffered by plaintiff at Harrar's hands.

The lower court overruled the motion. The Appellate Court held that this was error. And in reversing the judgment for plaintiff and remanding for a new trial, the court said (12 Ill. App., at p. 554):

> "That motion was denied by the court, and there was not even an instruction by the court directing the jury to disregard it; and if there had been, it would not cure the error. *The Lafayette, B. & M. R. R. Co.* v. *Winslow,* 66 Ill. 219; *Lycoming Fire Ins. Co.* v. *Rubin,* 79 Ill. 402."

Moreover, the cases relied upon by plaintiffs in their petition do not bear out the claimed conflict with other decisions of Courts of Appeals which is a paramount requirement under Rule 38, paragraph 5(b) of this Court. These cases may be dealt with very briefly.

In the first place, none of them involved evidence which is remotely similar, in inflammatory character, to the evidence which the trial court erroneously refused to strike out in the case at bar. In the second place, even disregarding this important difference, they cannot possibly be called decisions upon "the same matter" as is involved in the case at bar (Rule 38, par. 5(b) of this Court).

Brockett v. *New Jersey Steam-Boat Co.*, 18 Fed. 156 (C. Ct., N. Y.), cited by plaintiffs, is not in point (Pet'n for Cert., p. 16). It involved a failure of the complaining party to make timely objection to evidence, the admissibility of which could quite apparently have been determined at the time it was offered. Defendant's motion in the case at bar, on the other hand, was timely made. It was timely because it was made "when evidence apparently proper when admitted" was "subsequently shown to be objectionable"—that is, when, at the close of plaintiffs' case, it for the first time became apparent that the prejudicial testimony was not chargeable to the defendant.

Tevis v. *Ryan*, 233 U. S. 273, cited by plaintiffs (Pet'n for Cert., pp. 12, 17, 22), presented a question as to the proper method of instructing the jury, at the close of all the evidence, with regard to limiting the effect of certain documentary exhibits. It is no authority against defendant's right to strike prejudicial evidence at any proper time during the hearing of evidence.

Ross v. *New York C. & St. L. R. Co.*, 73 F. (2d) 187 (C. A. 6), cited by plaintiffs (Pet'n for Cert., pp. 12, 17, 18, 22), involved evidence as to which no timely objection, by motion to strike or otherwise, had been made. The court merely held that, having failed to object at all before, it was necessary for plaintiff to request an instruction on submission of the case to the jury that the evidence be excluded in order to assert error in that connection.

Ball v. *Sheldon*, 218 Fed. 800 (C. A. 2), cited by plaintiffs (Pet'n for Cert., p. 18), is likewise without bearing on anything here presented. It related to testimony which, as described in the court's own words, was "properly admitted over objection." In the case at bar, the preju-

dicial evidence was incompetent when defendant first objected to it by a motion to strike.

Plaintiffs contend that defendant's motion to strike should not have been granted because it was "too general" (Pet'n for Cert., pp. 16, 18-19). But, as defendant pointed out to the Court of Appeals, it is perfectly clear from the record in this case that defendant's motion and the ensuing argument adequately informed both the trial court and the plaintiffs of the evidence sought to be stricken (R. 180-181). This was sufficient. *Wade* v. *Whitsitt,* 9 Tenn. App. 436, 445-446 (cert. den. by Tenn. Sup. Ct., April 13, 1929); *Nashville, C. & St. L. Ry. Co.* v. *York,* 127 F. (2d) 606. The cases of *Puget Sound Power & Light Co.* v. *City of Puyallup,* 51 F. (2d) 688 (C. A. 9), and *Ford Hydro-Electric Co.* v. *Neely,* 13 F. (2d) 361 (C. A. 7), relied upon by plaintiffs, are accordingly inapplicable (Pet'n for Cert., pp. 16, 18, 19). There is no merit to plaintiffs' claim that the Court of Appeals' decision in the case at bar raised conflict either with the Ninth Circuit's or its own decisions.

It is submitted that the Court of Appeals correctly decided that defendant's motion to strike was proper in time and form, and that its decision raises no questions of conflict with any other Court of Appeals decision.

II.

The Court of Appeals Correctly Decided That the Trial Court's Error in Denying Defendant's Motion to Strike the Admittedly Prejudicial Evidence Was Not Later Cured; and This Decision Is Not in Conflict With Any Applicable Decisions of This Court.

Plaintiffs contend under Point I of their petition (Pet'n for Cert., pp. 10-15), as they did before the Court of Appeals, that the error committed by the trial court was

later cured by a form of instruction on damages which was given by the trial court on submission of the case to the jury.

It should be borne in mind that only if the defendant's motion to strike the prejudicial testimony had been granted would the defendant have been entitled to an instruction that the jury should disregard completely the evidence in question. By denying defendant's motion to strike, the trial court in effect ruled that defendant was not entitled to such an instruction. And the defendant was bound by the court's ruling in that regard.

The damage instruction was given not to "cure" the earlier error but in the light of another ruling of the trial court. It was the ruling on the motion, made at the conclusion of the entire case, for directed verdicts with respect to the false arrest and false imprisonment charges. On granting this motion, the trial court directed the jury to find the defendant not guilty as to these charges. These alleged illegal acts of arrest and imprisonment without a warrant were committed by the police prior to the signing of the complaints upon which the charge of malicious prosecution was based. The instruction in question simply told the jury that they were not to consider in fixing the amount of the damages any *illegal* acts committed prior to the signing of the complaints. It did not tell the jury to disregard the evidence as to *all* acts of the police which occurred during plaintiffs' detention up to the time when the complaints were signed, or to exclude any of such evidence in determining whether defendant was guilty of malicious prosecution. As the Court of Appeals properly found, the instruction did not cure the error.

Plaintiffs assert that the trial court's instructions, on their face, satisfy the "criticism" which the Court of Appeals has made of them in its opinion (Pet'n for Cert.,

pp. 13-15). But in doing this, plaintiffs omit from their twice repeated quotation from the Court of Appeals' opinion (Pet'n for Cert., pp. 7-8, 13-14) this significant portion (R. 442) (171 F. (2d), at p. 780):

> "* * * All of the prejudicial evidence as to what occurred before the defendant was called in and asked to sign the complaint, remained in the record and, as we have said, it could only prejudice the jury. To eliminate the prejudicial effect of this testimony, it was necessary that the court charge the jury that the acts of the police could in no wise be considered not only in fixing damages but also in determining whether plaintiffs were [defendant was] guilty of malicious prosecution, that is, whether defendant had reasonable cause to believe that plaintiffs were guilty or without such cause, maliciously caused plaintiffs to be prosecuted. In other words the charge did not remedy the error innate in the refusal to exclude prejudicial testimony."

Thus, if any further answer were needed, the Court of Appeals has furnished it in the above portion of its opinion which was omitted by plaintiffs.

Plaintiffs rely upon the case of *Pennsylvania Co.* v. *Roy*, 102 U. S. 451 (Pet'n for Cert., pp. 11-12), in support of their claim that the Court of Appeals' decision in the case at bar is in conflict with decisions of this Court. But an examination of that case shows, if anything, that the contrary is true. The plaintiff there had introduced testimony with reference, first, to his financial condition and, second, to the number and ages of his children, with the manifest object of impressing the jury with his family responsibilities.

The trial court had given the following instruction to the jury at the conclusion of the case (102 U. S., at p. 458):

> "But the jury should not take into consideration any

> evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being, how much his ability to earn money in the future has been impaired."

The Court held that this was a sufficient exclusion of the plaintiff's testimony concerning his pecuniary condition, and the language quoted at length in the plaintiffs' petition (Pet'n for Cert., pp. 11-12) was used by the Court in reaching this conclusion. But further examination of the decision discloses that the Court took a different view as to the sufficiency of the trial court's charge in excluding the other evidence. The Court held that the charge was not sufficient to exclude from the jury's consideration the testimony of plaintiff relative to the number and ages of his children. And the Court accordingly reversed the case for a new trial on that ground.

The cases of *Rogers* v. *The Marshal*, 68 U. S. 644, *First Unitarian Soc.* v. *Faulkner, et al.*, 91 U. S. 415, and *Fairmount Glass Works* v. *Cub Fork Coal Company*, 287 U. S. 474, relied upon by plaintiffs (Pet'n for Cert., pp. 14, 15), are likewise inapplicable. The situations presented in them, like the types of evidence involved, are too remote to warrant comment. At most they establish that there are cases where an instruction to the jury can be called plain and clear; that, in particular situations, appellate courts may be called upon to say about juries and courts what they did in those cases.

Under Point III (Pet'n for Cert., pp. 19-21), plaintiffs contend that the trial court's error in denying defendant's motion was rendered "harmless" within the contemplation of Rule 61 of the Federal Rules of Civil Procedure for the United States District Courts. They say that this resulted from defendant's cross-examination, from defend-

ant's introduction of "similar evidence," and from the giving of the damage instruction already referred to. The short answer to the first two claims is that, as is clearly disclosed by an examination of the record, there was nothing in the cross-examination or the later proof by defendant which could possibly be construed as neutralizing the effect upon the jury of the inflammatory evidence which the trial court improperly refused to exclude. The last contention, relative to instructions, has been fully answered above (this Brief, pp. 13-15).

The case relied upon by plaintiffs,—*Norwood* v. *Great American Indemnity Co.*, 146 F. (2d) 797 (C. A. 3) (Pet'n for Cert., p. 20),—is plainly inapplicable to the case at bar. It simply holds that, on the record there presented, hearsay testimony concerning decedent's conversation with plaintiff, his wife, about his injury became insubstantial. The reason for this was, as is evident in the quoted portion of the court's decision (Pet'n for Cert., pp. 20-21), that the hearsay "proof" concerning decedent's injury was brought in later by proper evidence. There was no such situation involved in the case at bar.

On the other hand, the fact that the "harmless error" principle is no support for plaintiffs' contention is established by decisions of this Court. In *McCandless* v. *United States*, 298 U. S. 342, the Court had occasion to consider the construction of Section 269 of the Judicial Code (28 U. S. C. Sec. 391) upon which Rule 61 is patterned. This Court said (298 U. S., at pp. 347-348):

> "* * * That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it

affirmatively appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26."

In the light of these views, it is apparent that the Court of Appeals could only have concluded on this record that the trial court's error related to the substantial rights of the parties, and that it did not affirmatively appear that such error "was not prejudicial."

Under Point IV of their petition (Pet'n for Cert., pp. 21-24), plaintiffs reiterate the various contentions which have already been fully answered. To these they add the contention that the insufficiency in the court's charge was remedied by argument of counsel. This contention, too, is without merit. Whatever may be plaintiffs' theory as to the import of the remarks of counsel, clearly it is the instructions given by the court which determine the sufficiency of the charge,—not the predictions of counsel as to what those instructions might be.

It is submitted that, contrary to plaintiffs' contention under their Point IV, the Court of Appeals in all respects stayed squarely within the limits of "the accepted and usual course of judicial proceedings," and the exercise of this Court's power of supervision on any such ground is utterly without warrant.

Conclusion.

As has been demonstrated, there was ample justification, in the record in the case at bar, for the Court of Appeals' decision that the judgment of the trial court should be reversed and a retrial ordered.

The trial court's denial of defendant's motion to strike left before the jury evidence which was bound to preju-

dice it. There was nothing in the case which can possibly be construed as eliminating the inflammatory effect of this evidence in the minds of the jury. Much less can it possibly be claimed that there was any *affirmative* showing that the evidence "was not prejudicial." *McCandless v. United States*, 298 U. S. 342, 348.

The undisputed evidence established that the plaintiffs had bought property, afterwards identified as a part of that stolen from defendant, under highly suspicious circumstances. Plaintiffs knew of the Admiral burglary and of the theft of the property involved in it. What they learned following their purchase and before their arrest amply supported the conclusion that they were continuing to hold stolen property with knowledge that it was stolen (R. 83-84, 85, 119, 131, 133, 203, 225; Def.'s Exs. 5 and 6, R. 384-C to 384-G). In the face of great doubt as to plaintiffs' right to recover at all, the jury returned verdicts totaling $32,500.00. Clearly there was justification for the close scrutiny given the record by the Court of Appeals and for its decision upon that record.

It is submitted that the Court of Appeals correctly concluded that the judgment of the trial court should be reversed and the cause remanded for a new trial; and that there is nothing in the case which warrants the allowance by this Court of a writ of certiorari. Plaintiffs' petition should accordingly be denied.

Respectfully submitted,

FRANCIS H. URIELL,
JOHN R. WHITMAN,
120 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Admiral Corporation, Respondent.

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